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PRACTICES OF INSTRUMENTALISATION ON MIGRATORY FLOWS. LEGAL PROBLEMS IN THE BELARUS CASE

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PRACTICES OF INSTRUMENTALISATION ON MIGRATORY FLOWS. LEGAL PROBLEMS IN THE BELARUS CASE

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Abstract: The dramatic flows of migrants that occurred above all during the year 2021 on the border between the European Union (EU) and Belarus are the result of aggressive policies of instrumentalisation of migrants adopted by the Russian federation. The Belarusian government has facilitated the opening of new migratory routes to the neighboring countries of Latvia, Lithuania and Poland with the aim of destabilizing EU and its Member States. This contribution aims to analyze the political and regulatory response of the European institutions to the phenomena of instrumentalisation of migrations to assess their compatibility with the international framework for the protection of fundamental rights and to understand whether an adequate balance has been achieved between the safeguarding of borders and the protection of the migrants involved. The questions for discussions are many and open, especially as regards the behavior of democratic States according to the principles and values of EU.

Keywords: external borders of the EU; instrumentalization; protection of fundamental rights; international protection; Poland; Belarus, international crisis; EU law; international public law; immigration; international offenses; countermeasures; European solidarity; international sanctions.

INTRODUCTION

Since the end of 2021 a large number of individuals (more than 8000) have crossed the Belarusian borders to enter the territory of the EU. There is a high migratory pressure on the European borders after the outbreak of the Ukrainian crisis which changed the geopolitical priorities in the area (Devi, 2021)[1]. The legal implications as well as the socio-political consequences are many and the EU once again has called itself to acknowledge and protect both the rights of migrants and the interests of individual EU Member States.

Within this context the EU members of the U.N. Security Council, joined by Norway, the United Kingdom, the United States, and Albania, condemned "the orchestrated instrumentalisation of human beings"[2] and blamed Belarus for facilitating "(...) the illegal crossing of the external borders of the European Union (...)"[3].

In particular on 12 November 2021 the Polish Border Guard declared that:

"(...) Belarusian personnel destroyed sections of the border fence during the

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1International Federation of Red Cross and Red Crescent Societies, Belarus and neighbouring countries-Europe region: population movement emergency appeal n. MGR65001, 6 -month operation update, 27 September 2022, https://reliefweb.int/report/belarus/belarus-and-neighbouring-countries-europe-region-population-movement-emergency-2.

2Foreign, Commonwealth & Development Office and Ambassador Sven Jürgenson, Estonian Permanent Representative to the UNJoint statement on Belarusian authorities' instrumentalisation of migrants 11 November 2021 The joint statement on the migrant crisis issued on Nov. 11, 2021, by Estonia, France, and Ireland jointly with Norway, the United Kingdom, the United States, and Albania, points to "the situation of the migrants" and the need "to provide and facilitate adequate protection and care (...)".

3Foreign, Commonwealth & Development Office and Ambassador Sven Jürgenson, Estonian Permanent Representative to the UNJoint statement on Belarusian authorities' instrumentalisation of migrants, op. cit.

> previous night and used lasers and strobe lights to harass Polish forces. As indicated earlier, the deliberate destruction of border installations with the aim of forcing or facilitating unauthorized entry constitutes a use of force (Nuňez-Mietz, 2020). (...) The use of laser lights and strobes does not appear, at least at first sight, to be a violent act (...)"[4].

The use of these laser lights and strobes were clearly intended to prevent the Polish border guards from carrying out their duties and thus to complement other violent efforts to breach the border. It should also be noted that, although not lethal, the laser lights employed were powerful enough to produce harmful physical effects[5]; their use adds to the gravity of the other destructive acts carried out by the Belarusian personnel against the fence. Accordingly, these acts were in breach of Article 2(4) of the UN Charter (Peilet, 2014; Hamonic, 2018; Marc de la Sablière, 2018; Higgins, Webb, Akande, Sivakumaran, Sloan, 2018). In this spirit the European Council has referred to the "ongoing hybrid attack launched by the Belarusian regime (...) and a brutal and violent hybrid attack (...)"[6]. The joint statement by EU member States and third nations in the Security Council on November 11 2021 refers to "hybrid operations" and describes Belarusian activities as "hybrid actions". These phrases were chosen carefully to avoid the impression that the right of self-defense might be engaged-as it would be at the point of armed attack[7].

4Foreign, Commonwealth & Development Office and Ambassador Sven Jürgenson, Estonian Permanent Representative to the UNJoint statement on Belarusian authorities' instrumentalisation of migrants 11 November 2021, op. cit.

5Foreign, Commonwealth & Development Office and Ambassador Sven Jürgenson, Estonian Permanent Representative to the UNJoint statement on Belarusian authorities' instrumentalisation of migrants 11 November 2021, op. cit.

6Brussels, 22 October 2021 (OR. en) EUCO 17/21 CO EUR 15 CONCL 5.

7Joint statement on Belarusian authorities' instrumentalisation of migrants. Delivered by

INSTRUMENTALIZATION OF MIGRANTS OR MIGRATORY NECESSITY?

The innumerable accusations during the elections of 2020 and the purchase of power by Lukashenko were the point of arrival and at the same time the end of an internal situation that everyone knew but no one took a position[8]. Simultaneously the violent repressions from the Russian Federation, as any form of democratic opposition, was a topic not for discussion but for political and legal reaction (Roth, Auseyushkin, 2020). In particular, the EU has responded with the usual tactic of economic sanctions with the aim of hitting the main exponents of the Belarusian power system[9]. Belarus has responded with an instrumentalization of migrants as a threat to the security and stability of the EU and its members. There is clear talk of propaganda operations and instrumentalisation of people by building direct migratory routes towards neighboring EU countries such as Latvia, Poland and Lithuania. The pressure tools they used are manifold such as the organization of flights and buses to bring citizens of third countries to Belarusian territory and the facilitation of various bureaucratic procedures that were necessary to obtain the visa for entry to Belarus (Kleczkowska, 2021). The continual back and forth resulted in a very large and high migratory flow towards their borders,

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Ambassador Sven Jürgenson, Estonian Permanent Representative to the UN on behalf of EU members of the Security Council, Norway, UK, US and Albania of 11 November 2021.

8BBC, Belarus election: opposition disputes Lukashenko landslide win, 10 August 2020, https://www.bbc.com/news/world-europe-53721410

9European Council, Timeline-EU restrictive measures against Belarus, https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-belarus/belarus-timeline/

has led various countries to talk about the need to decide and take regulatory measures to strengthen national borders as well as to limit the possibilities of entry into their territory (Siemiatkowska, 2023)[10].
Migrants are thus divided between two opposing forces. The possibility of a regular entry into the territory of the EU was impossible given that the Belarusian border guards prevented the possibility of going back and forcing the guard blocks with Poland, Latvia and Lithuania. This situation continued causing humanitarian consequences and above all the violation of fundamental rights of migrants and asylum seekers forced to the border between the EU and the Belarus[11].Within this spirit of anguish for migrants, the European Court of Human Rights (ECtHR), availing itself of the prerogatives according to Rule 39 of its Regulation, requested the adoption of emergency measures by the Latvian and Polish authorities to provide the necessary protection to all for the satisfaction of essential needs[12].

10ECRE Legal Note 11, Extraordinary responses: legislative changes in Lithuania, 2021, 3 Settembre 2021, https://ecre.org/ecre-legal-note-11-extraordinary-responses-legislative-changes-in-lithuania-2021/. Helsinki Foundation for Human Rights, Comments of the Helsinki Foundation for Human Rights on the Bill amending the Act on Foreign Nationals and the Act on Granting Protection to Foreign Nationals in the territory of the Republic of Poland, 6 September 2021. United Nation High Commissioner for Refugees, UNHCR law observations on Latvian declaration of emergency situation, 25 October 2021, https://www.unhcr.org/neu/69763-unhcr-law-observations-on-latvian-declaration-of-emergency-situation.html.

11Amnesty International, Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum-seekers and migrants facing pushbacks from the EU, 20 December 2021, Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum-seekers and migrants facing pushbacks from the EU - Amnesty International

12ECtHR, Affaire Rantsev v. Chypre et Russie of 7 Januar 2010; Afaire Catarn et autres v. Moldova et russie of 19 October 2012; Case of Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia of 19 November 2019; Stolkowski v. Poland of 21 December 2021. R.A.

These specific acts of violence may qualify as a use of force within the meaning of Article 2(4) of the Charter given their forcible character, effects, and context (Nuňez-Mietz, 2020). It is reasonable to assume that the migrants

> "(...) do not need to be told to attempt to dismantle or evade the border infrastructure, but are perfectly capable of deciding on this course of action themselves (...)" (Zimmermann, Tomuschat, Oellers-Frahm, Tams, Kashgar,

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and Others v. Poland of 27 September 2021; H.M.M. and Others v. Latvia of 26 November 2013. in particular in the last two cases, the Court decided:"(...) without prejudice to any duties that Belarus may have under international law regarding the situation of the applicants, to apply Rule 39 and request that the Polish and Latvian authorities provide all the applicants with food, water, clothing, adequate medical care and, if possible, temporary shelter. It clarified, at the same time, that this measure should not be understood as requiring that Poland or Latvia let the applicants enter their territories. The Court also noted that this decision was taken in accordance with the fact that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (...)".

Dieh, 2019; Gray, 2003; Mccaffrey, 2019; Vogit, 2019; Liakopoulos, 2020)[13].

The migrants do not therefore appear to carry out acts of violence on behalf of Belarus. In the present case the acts of violence took place at the border with Belarus may be qualified as an armed attack: no violation of an international frontier would ever give rise to the right of self-defense. These acts of violence are sufficiently substantial in their

13ICJ, Military and paramilitary activities in Nicaragua case (Nicaragua v. United States), in which the Court, in response to the argument that US conduct should have been justified as a reaction to the violation of rights attributable to Nicaragua, judgment, 27 June 1986, ICJ Reports 1986, page 14 et seq., par. 50. We must identify and differentiate jurisdiction and admissibility issues in the circumstances that the former concern the exercise of jurisdictional activity with respect to the subject of the dispute or with respect to one of the parties to the dispute while the admissibility issues refer to the existence of circumstances outside the competence of the body to know the dispute on merit. It is also necessary to specify that the instruments establishing certain permanent judicial requests between the reasons of admissibility of the application also include questions relating to jurisdiction. In other cases, it happens that it is the same request to declare an application inadmissible if the lack of jurisdiction is detected. The term admissibility will always be used as an expression distinct from that of incompetence or lack of jurisdiction. According to the writer's opinion, the question of the relationship between precautionary protection and admissibility of the appeal is not as crucial as that concerning the adoption of precautionary measures in situations of uncertainty about the existence of jurisdiction. And from a theoretical point of view it is admissible that different solutions can be envisaged depending on whether the uncertainty concerns the existence of jurisdiction or the admissibility requirements of the main application. In particular, the cited article states that: "1. In order to ensure prompt and effective action by the United Nations, members give the Security Council the primary responsibility for maintaining international peace and security and recognize that the Security Council in fulfilling its duties to this responsibility acts in their name. 2. In fulfilling these tasks, the Security Council shall act in accordance with the purposes and principles of the United Nations. The specific powers attributed to the Security Council for the fulfillment of these tasks are indicated in chapters VI, VII, VII and XIIX. 3. The Security Council shall submit annual reports and, when necessary, special reports to the General Assembly exam (...)".

scale and severe in their effects. Of course its open the discussion, rectius the international debate about an armed attack. Belarus is not in breach of Article 2(4) of the Charter on these grounds. As stated in the UN declaration of 1970 every State must

> "refrain from organizing or encouraging the organization of irregular forces or armed bands (...) for incursion into the territory of another State (...)" (Peilet, 2014).

Accordingly, the Belarusian authorities are in this sense:

> "(...) systematically supporting, enabling and arming groups of migrants to carry out acts of violence in their attempts to cross the border into the EU illegally (...) (Gouveinhes, 2012; Liakopoulos, 2020)[14].

14ICJ, Military and paramilitary activities in Nicaragua case (Nicaragua v. United States), in which the Court, in response to the argument that US conduct should have been justified as a reaction to the violation of rights attributable to Nicaragua, judgment, 27 June 1986, ICJ Reports 1986, op. cit., par. 288. In the judgment the interpretation given from art. 36 of the Statute in previous decisions, which had considered that the only requirement set by the rule was the delivery of the unilateral declaration to the general secretary of the United Nations, in accordance with art. 36, par. 4. See the sentence of 26 November 1957 on the preliminary exceptions in the case of the Right of passage in Indian territory (Portugal v. India), in ICJ Reports, 1957, parr. 125, 146. The sentence of 26 May 1961 concerning the preliminary exceptions in the Temple of Preah Vihear case (Cambodia v. Thailand), ICJ Reports, 1961, par. 31. The sentence of 26 November 1984 on jurisdiction and admissibility in the case of military and paramilitary activities in Nicaragua and against Nicaragua (Nicaragua v. United States), ICJ Reports, 1984, parr. 392, 412. Nigeria contested such an interpretation by pointing out to the unenforceability pursuant to art. 59 of the Statute in its own comparisons of decisions made previously among other parties. ICJ on the preliminary exceptions of 11 June 1998, admitted that art. 59 of the Statute extended the time of judgment of the previous decision to the new judgment, in the absence of subjective identity. However, it is worth noting that the precedents in question were not without value: "In ne saurait être question d'opposer au Nigèria les dècisions prises par la cour dans des affaires antèrieures. La question est en rèalitè de savoir si, dans la prèsente espèce, il existe pour la cour des raisons de s'ècarter des motifs et des conclusions adptès dans ces prècèdents (...)", in ICJ, Reports, 1998, par.

This amounts to "organizing" unlawful territorial incursions, it certainly constitutes, rectius "encouraging" such incursions in contravention of Article 2(4) of the Charter. On the other hand, the groups of armed migrants do not fit with the notion of "irregular forces". Therefore, the notion of "armed bands" (Brownlie, 1958) is broad enough to extend to such groups. According to the UN Charter rules

> "(...) not only bands or armed groups with conventional weapons should be treated as "armed bands," but also those that employ means capable of achieving analogous or comparable physical effects (...)" (Boisson De Chazournes, 1999; Garham, 2001; Zyberi, 2007; Lucak, 2012; Hernandez, 2014; Ranganathan, 2017; Tanaka, 2018)[15].

It is clear that Belarus is violating the sovereignty of its neighbors, as pointed out by the Polish Prime Minister Mateusz Morawiecki[16]. We speak about a threat of sovereignty as a rule of international public law. Belarus has violated Latvia, Lithuania, and Poland's sovereignty by causing physical damage on their territory and/or interfering with their exercise of the inherently governmental function of controlling access between migrants to their respective national territories.

HOW DID THE EUROPEAN INSTITUTIONS REACT?

Certainly there has been no lack of condemnations and criticisms from

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15ICJ, Lawfulness of the use of nuclear weapons by no-state in an armed conflict, ICJ Reports, 1996, parr. 38ss. Legality of the threat or use of nuclear weapons, advisory opinion 1996-I, in ICJ Reports of 8 July 1996, par. 26. Application of the international convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation), request for the indication of provisional measures, order of 15 October 2008.

16Address of Prime Minister Mateusz Morawiecki to officers of the Border Guard, Police and soldiers of 9 November 2021, in gov.pl.

the European context. We recall the European Commissioner for Migration and Internal Affairs Ylva Johansson who accused: "(...) the authorities of the former Soviet Republic of using human beings as an instrument of aggression against the EU (...)" (Parrock, 2021). In the same spirit the President of the Commission Von Der Leyen described the actions of Belarus: "(...) as a hybrid threat to the stability of the EU and its Member States (...)"[17]. We conclude with the European Council of 22 October 2021 where "(...) condemned the hybrid attacks carried out on the external borders of the EU (...)"[18].

The High Representative for Foreign Affairs and Foreign Policy Josep Borrell observed:

> "(...) how the disappearance of the distinction between war and peace in the current era leaves room for a variety of hybrid situations of dynamics of coercion, intimidation and competition which also includes what happened on the EU-Belarus border (...). There is no legally binding definition of "hybrid attack" (...)" (Hall, Fleming, Shotter, 2021).

According to the Strategic Compass document which was published by the European External Action Service:

> "(...) this terminology intends to indicate destabilizing actions carried out by state or not actors through tools of a hybrid nature, such as disinformation campaigns, cybernetics attacks or non-military threats of a terrorist nature (...)"[19].

17Statement by President von der Leyen at the joint press conference with NATO Secretary-General Stoltenberg and Latvian Prime Minister Kariņš in relation to the situation in Belarus and at its border with the EU, 28 November 2021, https://ec.europa.eu/commission/presscorner/detail/es/statement_21_6402

18Security Council of 21 and 22 October 2021. Conclusions of 22 October 2021, EUCO 17/21.

19European Union External Action, A strategic compass for the EU, 21 March 2022 https://www.eeas.europa.eu/eeas/strategic-compass-eu-0_en

The EU has responded to the consequences caused by the policies of propaganda and instrumentalization of migration with the relative help of the member countries that are involved and by issuing new sanctions against the authorities of the former Soviet Republic. Within this context, Lithuania received humanitarian and first aid assistance under the EU Civil Protection Mechanism. It is recalled that it received around 37 million euros from the Asylum, Migration and Integration Fund. We recall the operational support with the sending of teams of agents by Frontex, EASO (European office to support asylum policies) and Europol for the related management and reception of arriving migrants.
The sanctions against Belarus were then tightened as they tried to hit the subjects actively engaged in the organization of the new migratory routes that were directed towards the external borders of the EU. The Council suspended the application of the agreement between the EU and Belarus, making it more difficult to grant visas for people close to Lukashenko's system of power.

LITHUANIA, LATVIA AND POLAND. REGULATORY CHANGES FOR RECEPTION AND ASYLUM

It was necessary internally to make the first decisions in order to change the pre-existing situation as regards the asylum and reception policy for migrants. The first requirements were the protection, pressure of individuals and border control. In particular, the Lithuanian Parliament declared a state of emergency and approved two separate packages of amendments relating to the national legislation on the reception of foreigners[20]. The changes adopted were strictly limited to

20Seimas of the Republic of Lithuania, 'On the Law of the Republic of Lithuania amending

the right of asylum given that applications for international protection had been designated for this purpose. The suspensive effect for the appeal procedures was not envisaged given the negative outcome of the asylum applications and legitimizing the immediate expulsion of the appellant. The United Nations High Commissioner for Refugees (UNHCR) has held that:

> "(...) not considering the use of force as a last resort is contrary to the principles of necessity and proportionality and could lead to episodes of abuse of power (...)"[21].

Latvia, following the paths of Lithuania, has declared a state of emergency in the border areas with Belarus and has obviously forbidden the possibility of requesting any form of international protection for those who have crossed the border irregularly. According to the UNHCR, these forecasts strongly concerned the right to asylum in the territories concerned.

Poland established: "(...) immediate expulsion for those who entered the national territory irregularly (...)"[22]. This provision could also affect asylum seekers. The ECtHR has already requested Poland:

> "(...) the adoption of interim measures to guarantee 32 Afghan asylum

articles 5, 71, 76, 77, 79, 113, 131, 136, 138, 139, 140 on the Law on the Legal Status of Aliens No IX-2206 and Supplement of the Law with Chapter IX', XIV-506, 13 July 2021, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/fd41da33e47511eb866fe2e083228059?positionInSearchResults=0&searchModelUUID=b6287d34-4d5c-491a-9f60-10dd737fdf6d; Seimas of the Republic of Lithuania, 'On the Law of the Republic of Lithuania on the Legal Status of Aliens No IX-2206 Amendment to article 67', XIV-515, 10 August 2021 https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/ac2cfa50b06f11ecaf79c2120caf5094?jfwid

21United Nation High Commissioner for Refugees, UNHCR law observations on Latvian declaration of emergency situation, op. cit.

22Helsinki Foundation for Human Rights, Comments of the Helsinki Foundation for Human Rights on the Bill amending the Act on Foreign Nationals and the Act on Granting Protection to Foreign Nationals in the territory of the Republic of Poland , op. cit.

seekers, bordering on a village near the Polish border, the necessary (water, food, shelter, medical care) to the satisfaction of basic needs (...)"[23].

Poland did not comply with these requests as the persons concerned were within Belarusian territory[24]. Within this context there is a common emergency approach to the management of migratory flows aimed primarily at safeguarding the integrity of national borders involving an enormous flow of migrants as well as the fundamental protection of rights which remained in doubt as a subject not only of discussion but even without a definitive solution.

(FOLLOWS): STRUCTURAL CHANGES AND CONTINGENT MEASURES

First we must take into consideration the work of the European Commission (EC) where it has formulated two distinct regulatory initiatives. These are the proposal for a decision of the Council COM (2021) 752 final (Nicolosi, 2021)[25] and the proposal for a Regulation COM/2021/890 (Grześkowiak, 2022; Cornelisse, Reneman, 2022)[26]. The objective of the EC was to allow the Member States to deal with the consequences deriving from the increase in migratory flows and also to

23ECHR Press Release, Court gives notice of "R.A. v. Poland" case and applies interim measures, ECHR 283 (2021), 28 September 2021.

24Polish Ministry of the Interior and Administration, Poland provided the ECHR with its position on the order for interim measures, 30 September 2021, https://www.gov.pl/web/mswia-en/poland-provided-the-echr-with-its-position-on-the-order-for-interim-measures

25Proposal for a Council Decision on temporary emergency measures for the benefit of Latvia, Lithuania and Poland, of 1 December 2021, COM (2021), 752 final.

26Proposal for a Regulation of the European Parliament and of the Council to address situations of instrumentalisation in the field of migration and asylum, of 14 December 2021, COM (2021) 890 final.

update the legal system of the EU with the appropriate tools necessary to combat the phenomena of instrumentalisation of migrations. Directive 2011/95/EU (Craig, Zwaan, 2019; Leboeuf, 2022)[27] (so-called qualification directive) has identified:

> "(...) the requirements of third-country nationals or stateless persons, of the qualification of beneficiary of international protection, on a uniform status for refugees or for persons entitled to benefit from subsidiary protection, necessary for the recognition of international protection status and the related prerogatives (...)".

The Court of Justice of the European Union (CJEU) in case M. and others[28] relied on Directive 2011/95/EU confirmed that:

> "(...) the quality of "refugee" (...) of article 1, section A, of the Geneva Convention, does not depend on the formal recognition of this quality through the granting of "refugee status" (...) owing to well-founded fear of being persecuted (...), is outside the country of his nationality and is unable or (...) unwilling to avail himself of the protection of that country (...)"[29].

Thus, according to the CJEU, a refugee before

"(...) crossing the borders of the Union itself and even before entering the territory of EU, by virtue of Union law the Member States would be required, in their eventual relations with the refugee, to guarantee him the enjoyment of all the legal positions that would derive from the formal recognition of the relative status including, for example, those deriving from the principle of non-refoulement (...)"[30].

27Directive 2011/95/EU of the European Parliament and of the Council, laying down rules on the attribution, as regards the content of the protection recognized (recast), of 13 December 2011, in OJ EU L 337 of 20 December 2011, p. 9-26.

28CJEU, joined cases: C-391/16, C-77/17 and C-78/17, M and others (Revocation of refugee status) of 14 May 2019, ECLI:EU:C:2019:403, published in the electronic Reports of the cases.

29CJEU, joined cases: C-391/16, C-77/17 and C-78/17, M and others (Revocation of refugee status) of 14 May 2019, op. cit.

30CJEU, joined cases: C-391/16, C-77/17 and C-78/17, M and others (Revocation of refugee

However, the CJEU has not considered in our opinion Article 2, lit. f) of the Directive referred to subsidiary protection of individuals who do not meet the requirements of the Convention of refugees who in their regard have reasonable grounds to believe that, if they return to their country of origin would run a real risk of suffering serious damage (Hathaway, 2021)[31].

Directive 2013/32/EU[32] (so-called procedures directive) established:

> "(...) the procedures for registering and examining applications for international protection. Directive 2013/33/EU (Westendorp, 2022; Slingenberg, 2022; Čepo, 2022)[33] (so-called reception directive) which defines the reception conditions of those seeking protection (...)".

Regulation (EU) 604/2013[34] (so-called Dublin III Regulation) established the criteria for identifying the State responsible for examining an application for protection. Regulation (EU) 603/2013[35] (so-called

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status) of 14 May 2019, op. cit.

31As we can see alo from the CJEU in the next cases: C-901/19, CF, DN v. Bundesrepublick Deutschland of 10 June 2021, ECLI:EU:C:2021:472, not yet published; C-720/17, M. Bilali v. Bundesamt für Fremdewesen und Asyl of 23 May 2019, ECLI:EU:C:2019:948, published in the electronic Reports of the cases.

32Directive 2013/32/EU of the European Parliament and of the Council, laying down common procedures for the purpose of granting and withdrawing international protection status (recast), of 26 June 2013, in OJ EU L 180 of 29 June 2013, p. 60-95.

33Directive 2013/33/EU of the European Parliament and of the Council, laying down rules relating to the reception of applicants for international protection (recast), of 26 June 2013, in OJ EU L 180, of 29 June 2013, p. 96-116.

34Regulation (EU) no. 604/2013 of the European Parliament and of the Council, which establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), of 26 June 2013, in OJ EU L 180, of 29 June 2013, p. 31-59.

35Regulation (EU) no. 603/2013 of the European Parliament and of the Council, which establishes the "Eurodac" for the comparison of fingerprints for the effective application

Eurodac Regulation) provided for the establishment and management fingerprint examination database and Regulation (EU) 2021/2303[36] formed the European Asylum Support Office (EASO).
Within this context the reform of the Common European Asylum System (SECA) was discussed. In particular, the EC has adopted the communication "A new pact on migration and asylum" where it announces the forthcoming regulatory proposals in these sectors (Wessels, 2021)[37]. Two Regulations were to replace both the Qualification Directive and the Procedure Directive[38]. Reception

of regulation (EU) n. 604/2013 which establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection presented in one of the Member States by a third-country national or a stateless person and for comparison requests with Eurodac data submitted by Member States' law enforcement authorities and by Europol for law enforcement purposes, and amending Regulation (EU) No 1095/2010 1077/2011 which establishes a European agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), of 26 June 2013, in OJ EU L 180, of 29 June 2013, p. 1-30.

36Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing regulation (EU) n. 439/2010, in OJ EU L 468, of 30 December 2021, p. 1-54.

37Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new pact on migration and asylum, of 23 September 2020, COM (2020) 609 final.

38Proposal for a Regulation of the European Parliament and of the Council laying down rules on the qualification of third-country nationals or stateless persons as beneficiaries of international protection, on a uniform status for refugees or persons entitled to subsidiary protection and on the content of the protection granted, amending Directive 2003/109/EC of the Council concerning the status of third-country nationals who are long-term residents, of 13 July 2016, COM(2016) 466 final; Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU of 13 July 2016, COM(2016) 467 final.

procedures would be reformulated in a new Directive[39]. The EC had the intention of replacing the Dublin III Regulation with a new one with a broader and less concrete content on asylum and migration[40]. Reforms within the EU are many and far-reaching and are often counterproductive. The risk of a delegitimation of the political discussion took place above all in the European Parliament and a lack of democratic control over the effective safeguards in the sector for the protection of migrants, refugees and asylum seekers were topics still to be defined and better adjusted from the past according to the new needs encountered.

TOWARDS THE SUPPORT OF THE EU COUNTRIES AFTER THE BELARUSIAN HYBRID ATTACK

The first measure of a temporary nature was the approval of a proposal that we saw in practice through the proposal for Council decisions COM (2021) 752 final. This has established for a renewable period of 6 months the possibility for Lithuania, Latvia and Poland to exercise their tools in the face of the crisis situation resulting from the increase in migratory flows that was caused by the hybrid attacks of Belarus. The applicability of this proposal remains open to third-country nationals who present themselves irregularly on the territory of the three States in question as a result of Belarusian policies and to those who arrived after the decision was issued.

39Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), of 13 July 2016, COM(2016) 465 final.

40Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management, of 23 September 2020, COM(2020) 610 final.

Latvia, Lithuania and Poland had a time frame of 4 weeks to register applications for international protection giving the appropriate priority to families and minors. Thus we note the derogation of the maximum period of 10 days as provided for by art. 6 (1) of the Directive 2013/32 (so-called directive procedure). Thus, the authorities of the countries involved are granted the possibility of assessing the legitimacy of the applications for international protection, detaining the applicants in the border areas and preventing them from entering the national territory. The asylum procedure at the border did not include any exceptions for vulnerable people. As an exception, it remained for subjects with health problems, unable to be treated at the borders or in transit points. In theory, the outcome of the request for international protection could be taken within 16 weeks, thus missing the 21-day limit set by Article 43 (2) of the directive procedure. Thus the countries involved have had the right to provide conditions of assistance other than those provided for by articles 17 and 18 according to the provisions of the Reception Directive and having to protect the fundamental rights and essential needs of the relative persons who requested protection. There was no indication of the standards that the various reception measures had to achieve.

The difficulty and a definitive position remained open regarding the undoubted complexity of the border situation between the EU and Belarus given that it was difficult to find a meeting point between national interests and the protection of the fundamental rights of the people involved. The elapsed time questioned the emergency nature of the rules under investigation and the need to establish EU derogations on migration and asylum were open topics to be fixed. The choice of EC to use a legislative procedure that has been regulated by art. 78 TFEU

(Blanke, Mangiamelli, 2021) in order to formulate the proposal for the Decision COM (2021) 752 final was still pending for a final decision. In particular Article 78 TFEU regarding the matter of asylum, respecting the Refugee Convention, stated that:

> "the Union is developing a common policy on asylum, subsidiary protection and temporary protection (...). This policy must comply with the Geneva Convention of 28 July 1951 and the protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties (...)" (Schwarze, Becker, Hatje, Schoo, 2019; Kellerbauer, Klamert, Tomkin, 2019; Berry, Homewood, Bogusz, 2019; Mangas Martìn, 2019; Blanke, Mangiamelli, 2021)[41].

LEGITIMACY OF THE JURIDICAL CHOICES AND DOUBTS IN THE PRACTICE AND EFFECTIVENESS OF THE MEASURES TAKEN

It is recalled that the Council, following a proposal from the EC, may adopt temporary measures to support one or more Member States facing emergency situations caused by the sudden influx of migrants from third countries. Within this context, the European Parliament has a purely advisory role in this procedure. Not infrequently, the Court of Justice of the European Union (CJEU) has also taken a position in relation to Article 78 (3) TFEU which should be activated

> "(...) only and exclusively in emergency circumstances where the increase in migratory flows makes the normal functioning of the national reception and asylum systems impossible (...)"[42].

41In the same spirit see also the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011, p. 9-26. See also from the CJEU the case: C-69/10, Samba Diouf of 28 July 2011, ECLI:EU:C:2011:524, I-07151.

42CJEU, joined cases C-643/15 and C-647/15, Slovak Republic and Hungary v. Council of 6 September 2017, ECLI:EU:C:2017:631, published in the electronic Reports of the cases.

The EC was able through the procedure established by art.78 (3) TFEU to propose two Decisions (Voynikov, 2019)[43] and then to be adopted by the Council trying to implement a reallocation scheme in the other EU States and of migrants arrived in Greece and Italy. According to the CJEU:

> "(...) a Member State can be said to be in an emergency situation due to an increase in migratory flows when the number of arrivals can lead to a crisis in national asylum procedures and to the saturation of reception systems (...)"[44].

The proposal to activate the regulatory procedure according to Article 78 (3) TFEU, faced with numbers far from those recorded in 2015, "will have to take the measures envisaged to deal with the emergency situation caused by the hybrid attacks unleashed by Belarus (...)"[45].

Finally we can talk about the legitimacy of the application of Article 78 (3) TFEU above all through an increase in migratory flows manageable with the regulatory instruments of the EU on migration and asylum which is in force. Given the consultative role of the European Parliament, the compromising behavior of the institutional system in the drafting of legislation represents a prejudice to the credibility of the parliament itself, given that it is called in relation to the legitimacy

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43Council Decision (EU) 2015/1523, establishing provisional measures in the field of international protection for the benefit of Italy and Greece, of 14 September 2015, in OJ EU L 239 of 19 September 2015, p. 146-156. Council Decision (EU) 2015/1601, establishing provisional measures in the field of international protection for the benefit of Italy and Greece, of 22 September 2015, in OJ EU L 248 of 24 September 2015, p.80-94.

44CJEU, CJEU, joined cases C-643/15 and C-647/15, Slovak Republic and Hungary v. Council of 6 September 2017, op. cit., parr. 218, 256.

45European Commission Press Release, Asylum and return: Commission proposes temporary legal measures and practices to address emergency situation at EU external borders with Belarus, 1 December 2021.

of exceptions concerning rules that are also the subject of discussion in the parliamentary assembly itself.

PROPOSALS FOR STRUCTURAL CHANGES OF THE EU ORDER IN THE FACE OF THE MIGRATION CRISIS

The member country of the EU that feels threatened by the hostility of migrations can ask for the activation of the EC and after evaluating the situation under investigation to formulate and propose a decision in the Council. If the decision is adopted, the State can take advantage of the relative derogations provided for by Regulation 2021/890 for a period of 6 months which can be extended in order to continue the situation and the crisis created. Despite the fact that the Council's decision concerns a specific situation at the external borders of the EU, each Member State can adopt the relative measures granted for the foreseen time.

Within this spirit we recall the proposal of Regulation COM/2021/890 where it establishes some derogations to the EU system of migration and asylum in the face of continuously increased flows of migrants who are exploited by third States[46]. The Regulation 2021/890 takes measures that recall those pre-established by the proposal for Decision of the Council COM (2021) 752 final. The Member State concerned is allowed to decide whether requests for international protection are presented and registered only at certain points especially at the border designated for this purpose. Registration of applications is extended to 4 weeks. The Regulation 2021/890 also provides the possibility to apply the asylum procedure at the border to decide on the admissibility and

46Proposal for a Regulation of the European Parliament and of the Council to address situations of instrumentalisation in the field of migration and asylum, of 14 December 2021, COM (2021) 890 final.

merits of all applications received except for medical cases. The duration of this procedure extends up to 16 weeks. No suspensive effect is envisaged in relation to the appeal made in the event of the refusal of the request for international protection. This is a worrying achievement given the implementation of the tragic consequences for the migrants concerned and the arrival of the eventuality in which the appellant is expelled from the appeal itself making the same procedure useless. The policies on the instrumentalisation of migrants provide conditions for implementation that are different from those envisaged by the Reception Directive and respect the essential needs of migrants and asylum seekers[47].

In our opinion, this is not a perfect regulation and is prone to solving immigration problems that have to do with huge exploited groups. Respect for the principles of proportionality and subsidiarity remains open as well as perplexity regarding the actual need to adopt broad derogations from the EU regulatory system to address the phenomena of instrumentalisation of migrations. The European Economic and Social Committee has expressed relative doubts about the effective protection and safeguarding of the fundamental rights of migrants in the event of the implementation and entry into force of the "instrumentalisation" Regulation.

In December 2021, the European Commission presented a related proposal for the reform of the Schengen Border Code (CFS) to intervene on the control and management procedures of the internal and external borders of the European Union[48]. The legislative initiative has

47Follow the steps of procedure in the next site: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM:2021:890:FIN#2022-02-11_DIS_byCONSIL

48Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 establishing a Union code relating to the arrangements for

raised numerous concerns regarding the protection of the fundamental rights of migrants at the borders. This reform concerns the tools envisaged to combat the phenomena of instrumentalisation of migrations. In reality, the proposal made by the EC stands out in the security sector given that migratory flows are a strong element of destabilization for the security, stability and peace of the whole EU as well as of its members. This is how the state conduct of privilege of control of national borders and the protection of migrants' rights are justified. The emptiness and exhaustiveness of the migratory phenomenon also remains in the present proposal without a doubt despite the fact that for years now the EU has had an important experience with the migratory phenomenon but it is still weak perhaps for political reasons to take concrete measures and definitively resolve the migratory problem within the European borders.

WEAK INTERPRETATIVE CLARITY IN THE DEFINITION OF INSTRUMENTALISATION

According to the recital 1 of the Regulation COM/2021/890, it provided and affirmed the proposal for the reform of the Schengen Borders Code through a definition of instrumentalisation which presents various aspects, ambiguous in interpretation and, leaving a wide margin of application uncertainty[49]. Thus, the instrumentalisation of migrants is defined as a situation in which a third State adopts the related policies aimed at encouraging the opening of new migratory routes towards the EU with the aim of destabilizing the Union itself or its member

crossing borders by persons, 14 December 2021, COM (2021) 891 final.

49ECRE Comments on the Commission Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Instrumentalisation in the Field of Migration and Asylum, COM(2021) 890, January 2022.

countries. The consequences of such actions must jeopardize essential functions of the State such as its territorial integrity, the maintenance of public order, and the safeguarding of national security.
The related objective assessment tools are not reported in the event that a third State involved actually has a hostile intention and the actions can destabilize the EU and its member countries to the point of endangering the exercise of the vital functions of one State. The parameters where the EC must comply with the preliminary assessment aimed at deciding the actual need for derogations within the regulatory framework of the EU on migration and asylum to deal with a specific emergency brought to its attention are also not reported. We are talking about broad definitions lacking in interpretative criteria but the response of the EU to phenomena of instrumentalisation of migrants who become objects of clearly political dispute remains faithful (Heinikoski, 2022). Member States can invoke the existence of an emergency situation on their borders by attempting to fail in their duties of managing migratory flows. It is a juridical uncertainty that involves a diversity of applicable treatments and as a consequence a discrepancy in the relative standards of protection that are guaranteed to migrants as objects of instrumentalisation. The EU until today, whenever a migration crisis arose and had to deal with it in order, took the path of political goals. We recall the Turkish case dating back to 2016 towards Greece[50]. Migratory pressure has led the European Union to resume:

> "(...) negotiations with Turkey for the signing of a new agreement, signed on 17 December 2020, for the finalization of the remaining contracts in the

50Border Violence Monitoring Network, New report on violations at Greek borders, 19 March 2020, https://www.borderviolence.eu/new-report-on-violations-at-greek-borders/

Facility for Refugees in Turkey program (...)"[51].

The case of Morocco is also recalled in this spirit, which did not hinder the flow of about 10,000 people to the borders of the Spanish enclave of Ceuta: "(...) as a retaliatory protest against the Spanish decision to give hospitality to Brahim Ghali, leader of the independence movement of the Polisario Front[52](...). Spain's recognition of Moroccan sovereignty over the territories of Western Sahara seems to demonstrate how migratory pressure has borne fruit in terms of political negotiations (Minder, 2022).

No one denies the sensitivity of the EU and its members to the "face" shown towards the migration crises given that we note the stimulus of policies to exploit migration especially from third countries that are always "willing" to obtain political and economic advantages in their relations with European partners. We note a reversal of the system of political conditionality and power where the neighboring countries do not assert their prerogatives before the EU in constant difficulty by respecting the management of migratory flows but not always the protection and life of these migrants (Cassarino, 2007). Politics and affirmations are oxymorons but remain the migratory reality especially in recent years.

WHAT KIND OF "SECURITY COHERENCE" DOES EXIST IN THE FIELD OF MIGRATION AND ASYLUM?

51European Commission Press Release, EU signs final contracts under the € 6 billion budget of the facility for Refugees in Turkey, 17 December 2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2487

52Reuters, Moroccan ministers link Ceuta crossings to Polisario leader's hospitalisation, in Reuters, 19 May 2021, https://www.reuters.com/world/moroccan-minister-links-ceuta-crossings-polisario-leaders-hospitalisation-2021-05-19/

The only coherence presented by the EU is to take a stand in the face of crises but without definitively resolving these flows and stopping the relative instrumentalisation in the political sector. The European Parliament examined the reform package in the so-called: Pact on Migration and Asylum that the EC must represent a new beginning for migration policies in the European context.

Within this spirit we recall the Regulation COM (2020) 613 final and the related coordination issues especially in providing the States of the EU with the related necessary tools to deal with crisis situations in the field of migration and asylum[53]. The European Parliament continues to discuss in recent years for a definitive regulatory text suitable and designed by the migratory crises at the European borders. There is definitely no definition of a crisis situation or force majeure, as is the effectiveness of the concept of instrumentalizing migratory flows. A wide margin of discretion cannot be used by States by evading their responsibilities for reception and management of migratory flows. It is legitimate to speak of the trend of fragmentation on a national basis of the regime of derogations that can be activated by choice which is not juridical but clearly political. The consequences are a legislative confusion between an ordinary and extraordinary system for the protection of the rights and security of both the receiving State and the migrants, refugees and asylum seekers. The difficulties continue and especially in assuming a single directive path in terms of migration policies due to the interests that do not always converge in the individual Member States. Above all, this weakness risks continuous hybrid attacks and continuous instrumentalisaiton of migrants by

53Proposal for a Regulation of the European Parliament and of the Council concerning situations of crisis and force majeure in the field of migration and asylum, of 23 September 2020, COM (2020) 613 final.

hostile third States where the combat proposals are still incomplete and unresolved.

A SPACE FOR THE PROTECTION OF MIGRANTS' RIGHTS

From the past, the first direction in the face of migratory flows was to prevent and hinder the entry of third-country nationals within the territory of the EU without taking into consideration the needs and requirements of the migrants themselves.

We have not seen in this matter proposals for relocation or similar instruments of interstate solidarity that could alleviate the commitments of the individual countries hit by the related migratory flows (Kassoti, Idriz, 2023).

The principle of solidarity at the level of primary law of the EU comes from the distant Treaty of Amsterdam with Article 63, par. 2, lit. B TEU (Blanke, Mangiamelli, 2021). The principle of solidarity was also included with the treaty of Lisbon through Article 67, par. 2 TFEU. The implementation mechanisms of this principle also from a financial point of view suggest Article 80 TFEU (Blanke, Mangiamelli, 2021). The implementation mechanisms must be based on a proportional basis among the various member countries according to the reception and asylum commitments where the principle of solidarity assumes an important value at a pre-normative level given the recognition by the primary law of the EU[54]. The CJEU stated:

> "(...) the characterizing role played by interstate solidarity in EU migration and asylum policies by rejecting the annulment appeals filed by Slovakia and

54CJEU, conclusions of the Advocate general Yves Bot in joined cases C-643/15 and C-647/15 of 26 July 2017, ECLI:EU:C:2017:618, published in the electronic Reports of the cases, par. 22.

Hungary against Council Decision 2015/1601 (...)"[55].

Two countries had in fact opposed a plan for the compulsory relocation of around 120,000 protection seekers, aimed at easing the reception burdens weighing on Greece and Italy in particular. It acknowledged that the decision under dispute implemented the principle of solidarity and fair sharing of reception and asylum commitments among the various Member States[56].

A principle of relocation can guarantee an ideal tool for managing migratory flows in a perspective of interstate solidarity. The following may enter the relocation of: beneficiaries of international protection to whom this status has been granted for less than three years (Article 45, paragraph 1, letter c); applicants subjected to the asylum procedure at the border (Article 45, paragraph 2, letter a), or those who are in conditions of irregular stay (Article 45, paragraph 2, letter b). Safeguard clauses are thus foreseen which prevent the relocation of persons who may pose a threat to national security and stability.

It is not possible to resort to such an instrument in dealing with the phenomena of instrumentalisation of migrants as substantial derogations from the Common European Asylum System (SECA) are allowed. A derogatory system can undermine the foundations of the European rule of law by contributing to the fragmentation of the standards of protection offered to migrants[57].

55Council Decision (EU) 2015/1601, establishing provisional measures in the field of international protection for the benefit of Italy and Greece, of 22 September 2015, op. cit.

56CJEU, CJEU, joined cases C-643/15 and C-647/15, Slovak Republic and Hungary v. Council of 6 September 2017, op. cit., par. 252.

57European Council on Refugees and Exiles, ECRE comments on the Commission proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum COM (2021) 890 final, 27 January 2022.

Countries affected by migratory flows can establish material reception conditions that only cover the primary needs of third-country nationals (or stateless persons) who have entered the national territory as a result of episodes of instrumentalisation of migration according to Article 3 proposed Regulation COM/2021/890 and Article 3 of the proposed Council Decision COM (2021) 752 final. The relative indications regarding the methods of following and guaranteeing the satisfaction of these fundamental needs are not mentioned, just as specific protections are not provided for individuals who are vulnerable such as accompanied or unaccompanied minors, disabled people, etc. A wide margin of discretion that ensures the achievement of the minimum standards of protection for the people involved have as a consequence the risk of violation of human dignity according to what established by Article 1 of the Charter for the Fundamental Rights of the European Union (CFREU) (Kellerbauer, Klamert, Tomkin, 2019). The 4-week period in which States can register the applications for protection received raises many problems. This is a very long time, difficult for the subjects involved to prove their status as applicants and enjoy the rights and protection connected to it.

The applicability of the asylum procedure at the border towards migrants arriving at the borders of the EU as a consequence of the acts of instrumentalisation of migratory flows is a weak and critical point. Member States can decide on the admissibility of applications for international protection made by third-country nationals or stateless persons given that persons concerned are detained at their national borders or in transit zones. Priorities are requested from those presented by minors and possibly by their family members. Vulnerable people, children, the disabled, etc. are not excluded from the

mechanism. Those where one's reception requires special and ad hoc needs. According to Article 3 of the proposal of Regulation COM/2021/890 and 3 proposal of Council decision COM (2021) 752 final the period of examination of registered applications for international protection can be extended up to 16 weeks. The use and usufruct of the asylum procedure at the border for such a long period confirms that one of the objectives of the legislative proposals under investigation allow the Member States to prevent, slow down, hinder new entries into their national borders. The effective protection of the fundamental rights of migrants is an unaware tool of hostile practices of instrumentalisation of migratory flows.

> "(...) The persons concerned are therefore forced to wait at the border, without being able to actually enter the territory of the requested State, for up to 16 weeks to find out the outcome of their application for international protection. The legitimacy of this compression of freedom of movement is the subject of heated academic and legal debate (...)" (Tazzioli, Garelli, 2020; Cornelisse, Reneman, 2021; Cornelisse, 2021).

Art. 8 of the Reception Directive states: "(...) that Member States cannot detain people because of their status as asylum seekers (...)"[58].

In the same spirit, the ECtHR has classified as:

> "(...) de facto detention, in the absence of any provision to formalize this status, the condition of asylum seekers forced to wait at the border for a judgment on the legitimacy of their applications and without be able to access the territory of the requested State or return to the country of transit or of origin without having first renounced their request for international protection (Grabenwarter, Pabel, 2021) (...)[59].

58United Nation High Commissioner for Refugees, Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016, May 2016, https://www.refworld.org/docid/57319d514.html

59ECtHR, Ilias and Ahmed v. Hungary of 21 November 2019; M.H. and others v. Croatia of

It should be noted that the CJEU considered that Hungary had established a system of systematic detention of applicants for international protection in the transit zones of Röszke and Tompa (Favi, 2022; Molnàr, 2022)[60].

It is understood that persons from third countries arriving from Belarus in a state of detention at the external borders of the EU may raise concerns about the effective protection of the right to freedom under Article 6 CFREU and Article 5 of the ECHR (South, 2021). The regime of containment and the restriction of the freedom of movement of those seeking protection represents a violation of the prohibition of torture and inhuman and degrading treatment according to Articles 4 CFREU and 3 ECHR (Grabenwarter, Pabel, 2021; Sudre, 2021). The exclusion of minors from the application of the asylum procedure at the border can endanger the rights of children according to Article 24 CFREU (Grabenwarter, Pabel, 2021). Principle which was also affirmed by the ECtHR according to the M.K. and others v. Poland of 23 July 2020 where Poland was convicted of rejecting asylum applications as well as violating the procedures for examining their asylum applications. In particular the ECtHR stated that:

> "(...) unanimously, (recognizes) that there has been a violation of Article 3 of the Convention on account of the applicants being denied access to the asylum procedure (...) raised arguments concerning the reasons for not considering Belarus to be a safe third country for them and why (...) returning them to Belarus would put them at risk of "chain-refoulement" (...) the assessment of those claims should have been carried out by the Polish authorities acting in compliance with their procedural obligations under Article 3 of the Convention (...)" (Nussberger, 2020; Kosař, Petrov, Šipulovà,

18 November 2021, par. 257-259.

60CJEU, C-808/18, European Commission v. Hungary of 17 December 2020, ECLI:EU:C:2020:1029, published in the electronic reports of the cases, par. 166.

Smekal, Lyhnànek, Janovský, 2020; Villiger, 2020).

The registration of requests for international protection in some specific areas as provided for by Article 6 (3) of the Procedure Directive prevents the exercise of the right to asylum. This right imposes the obligation on States to carefully evaluate the applications received without taking into account the manner in which the applicants entered the national territory[61]. We recall and note the impossibility for migrants to reach the designated transit points, making access to international protection procedures a theoretical practice[62].

The ECtHR judged that:

> "(...) the practice of pushing migrants who have entered the national territory illegally across the border violates the prohibition of collective expulsions (Article 19 (1) CFREU Article 4, prot. 4 ECHR)" (Grabenwarter, Pabel, 2021; Sudre, 2021)[63]. "(...) The limited access to the established transit points and the lack of adequate mechanisms to guarantee the effective admission of third-country nationals to the entry procedures make the right to asylum concretely ineffective. The expulsion of foreign persons from the national territory, without prior examination of the individual circumstances and the possibility of appeal, therefore violates the prohibition of collective expulsions (...)" (Sudre, 2021; Villiger, 2023)[64].

The generalized application of the asylum procedure at the border also risks being in conflict with the principle of non-refoulement, according to which no one can be expelled or rejected towards the borders of a country where his freedom or his life would be at risk according to discriminatory criteria such as race, religion, political opinions or

61United Nation High Commissioner for Refugees, UNHCR law observations on Latvian declaration of emergency situation, op. cit., par. 13.

62ECRE Legal Note 11, Extraordinary responses: legislative changes in Lithuania, 2021, op. cit.

63ECtHR, Shahzad v. Hungary of 8 July 2021, par. 65.

64ECtHR, D.A. and others v. Poland of 8 July 2021, parr. 78-80.

belonging to a certain social group Article 33 of Geneva Convention of 1951 on the status of refugees and Article 19 (2) CFREU (Fleck, 2021; Van Dijk, 2022)[65].

By respecting the principle of non-refoulement, this non-theoretical or formal but substantial and concrete principle becomes effective (Mavronicola, 2012; Dourneau-Josette, 2020; Eleftheriadis, 2022)[66]. States must not abstain from their attitude of rejecting persons to third countries since their own integrity will be at risk but they are required to put into practice specific guarantees with any possible way[67]. The requested States must carefully evaluate and based on the actual concrete circumstances, especially regarding the applications for international protection that have been received and avoid collective expulsions and types of automatic repatriations to Belarus (De Conick, 2021).

The principle of non-refoulement arises as a consequence of a lack of recognition of any type of suspensive effect to appeals in a manner contrary to the negative outcome of applications for international protection which are advanced in contexts of instrumentalisation of migrants according to Article 4 of the proposed Regulation COM/2021/890 and Article 2(6) of the proposed Council Decision COM (2021) 752 final. Interested parties cannot remain on the territory of the requested State waiting for a final and always positive result of the review of their requests, so they are sent away to countries where they could risk their physical and psychological integrity. Thus there is a risk of the concrete exercise of the right to an effective judicial remedy as established by Article 47 CFREU (Lebrun, 2016). The suspension of

65The 1951 Refugee Convention.

66ECtHR, Hirsi Jamaa and others v. Italy of 23 February 2012, par. 175.

67ECtHR, M.K. and others v. Poland of 23 July 2020, parr. 170-173.

the expulsion measures that are subject to appeal judgment avoiding the removal of the persons concerned to susceptible and dangerous countries to pursue policies of instrumentalisation of migrations[68].

FINAL CONSIDERATIONS

We have once again seen that the migratory crises continue and are always current and evolving topics. We note a progressive justification of a system of derogations from the European context in the matter in question[69] putting the necessary substantive and procedural guarantees for the protection of third-country nationals who are victims of the policy of instrumentalisation. Even today, we have not seen ad hoc rules or sanctions against hostile countries that use migratory flows as an instrument of pressure and degrading destabilization of areas at risk. The trend of arrival of migratory flows as a threat to internal stability and national security (Huysmans, 2000; Bello, 2022; Kabata, Jacobs, 2022; Stepka, 2022) are topics that are difficult to understand and of a solution strategy of the EU especially at the management of the reception and integration mechanism of individuals from third countries, stimulating even more hostile states to act positively (Bender, 2021). The weakness undertaken both by the EU and the political will to affirm a sensitive vision in front of countries like Poland, Latvia, Lithuania opens a tension in the migration and asylum sector. The lack of a uniform, coordinated and formulated political

68European Council on Refugees and Exiles, A step too far: introducing "instrumentalisation" in EU Law, Policy Note #40, 25 March 2022, https://ecre.org/policy-note-a-step-too-far-introducing-instrumentalisation-in-eu-law/

69European Council on Refugees and Exiles, ECRE comments on the Commission proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum COM (2021) 890 final, op. cit.

guideline to deal with situations of crisis and force majeure of migratory flows is an uncertain reality that contributes to a weak system for the protection of fundamental rights. According to our opinion, destabilization means dehumanization which legitimizes degrading treatment that is inferior to the standards of human dignity. The balance is always against human lives despite the fact that the interest of individual states remains the inviolability of their borders even at the cost of moving away from interstate solidarity by re-evaluating the relocation mechanism as a burden of reception by the most affected States by migratory flows. The EU must propose new clear, uniform rules towards a more humanised and less fragmented policy characterized by establishing the protection of people's rights as an exclusive priority and at the forefront of the action of each EU Member State.

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